85-1881

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
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No. _____

****

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN J. STANTON,

Petitioner

v.

DISTRICT OF COLUMBIA COURT OF APPEALS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John J. Stanton
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****

351P

QUESTION PRESENTED

Under District of Columbia Court of Appeals v. Feldman, 460 US 462, 103 SCt 1303, does a federal district court lack jurisdiction of a 42 US Code 1983 action by an attorney challenging for want of due process a state bar rule, promulgated in non-judicial proceedings and applied in disciplinary action against him, providing for disposition of motions raising due process issues of vagueness and overbreadth of disciplinary charges after the hearing or trial on the factual merits of the charges?

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OPINION BELOW

The unpublished order of the United States District Court for the District of Columbia is reproduced and appended to this petition. The judgment of the United States Court of Appeals for the District of Columbia Circuit is reported at 782 F2d 278.

JURISDICTION

Jurisdiction is invoked under 28 US Code 1254(1) for review of the dismissal order of the United States District Court for the District of Columbia in civil action 84-1619 affirmed without opinion by the judgment of the United States Court of Appeals for the District of Columbia Circuit entered 14 January 1986 and made final 5 March 1986 by orders denying rehearing or modification of judgment in case 84-5831.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"No person shall be ... deprived of life, liberty, or property without due process of law," Constitution, Amendment 5.

"All motions directed to the manner in which the hearing is to be conducted shall be ruled upon by the hearing committee chair or the chair's designee either at a prehearing conference as provided in Rule 7.14 or at the time of the hearing. In the case of a motion directed to the admissibility of evidence, the evidence, if oral, shall be heard by the hearing committee and, if documentary, shall be included in the record, and the hearing committee shall include in its report to the board a recommendation for disposing of the motion, except that if the hearing committee chair determines that the evidence is privileged, irrelevant, or merely cumulative, the chair may exclude the

evidence after allowing the proponent to make a proffer on the record. As to all other motions, the hearing committee shall include in its report to the board a proposed disposition and the reasons therefor. The board shall rule on all such motions in its disposition in the case," Rule 7.12, Board on Professional Responsibility, District of Columbia Court of Appeals, 1 July 1983.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States," 28 US Code 1343.

SUPREME COURT OF THE UNITED STATES

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DISTRICT OF COLUMBIA COURT OF APPEALS,

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PETITION FOR WRIT OF CERTIORARI TO
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STATEMENT OF THE CASE

In disciplinary proceedings prosecuted against petitioner, a member of its bar, respondent applied a new rule requiring its disciplinary factfinder to "recommend ... what disposition should be made of any motions," In re Stanton, 470 A2d 281, 285, together with recommendations "as to the ulti-

mate disposition on the merits," Ibid., of the disciplinary charges in any "case in which the [attorney] [is] not fairly notified of the charges against him because the petition [is] so inadequate as not to allow him to know with what he [is] charged," Ibid. Accordingly, when petitioner moved to dismiss the charges against him as vague and overbroad, respondent's factfinder refused to render a pretrial decision on his motion.

This "recommended disposition" rule was promulgated by respondent's disciplinary agency in July 1983. Respondent's disciplinary action against petitioner culminated in a November 1983 judgment and order suspending petitioner for various, unprecedented violations of "an obligation to pursue [client] objectives as they see them," In re Stanton, 470 A2d 272, 276, and ruling that "no fault appears on the face of the petition ... in this case," In re Stanton, 470 A2d 281, 285.

After an attempt to obtain Supreme Court review of this judgment, Stanton v. District of Columbia Court of Appeals, 466 US 972, 104 SCt 2347, petitioner applied to the district court for a judgment under 42 US Code 1983 declaring respondent's new procedure in violation of the due process clause for want of fair notice and opportunity to be heard. alleging that in the disciplinary proceedings he had protested the unconstitutional procedure and the vague, overbroad charges but that respondent had ignored his protests and refused to hear and adjudicate them. The district court dismissed, ruling that,

> It is clear that the plaintiff seeks to have this court review a final judicial decision of the District of Columbia Court of Appeals. This court lacks jurisdiction to do so. District of Columbia Court of Appeals v. Feldman, 103 SCt 1303, 1317 (1983). [emphasis original]

On appeal, respondent admitted that its disciplinary "method of disposing of

motions is rulemaking and not a judicial act" (Brief for Appellee at 9) and conceded petitioner's motion to modify the judgment of affirmance to allow the district court to hear his complaint if amended to allege promulgation of respondent's disciplinary motions procedure rule in nonjudicial proceedings, the dismissed complaint having been silent as to the genesis of the rule challenged by petitioner's action; nevertheless, the court of appeals for the District of Columbia (DC) Circuit affirmed the dismissal order without opinion, Stanton v. DC Court of Appeals, — US App DC — , 782 F2d 278, and denied the motion to modify its judgment of affirmance to allow petitioner to proceed on his complaint with the proposed amendment. This petition followed.

ARGUMENT

Concluding that petitioner sought to have it "review a final judicial decision," the district court cited the following excerpt from the opinion in Feldman, supra, to show why this conclusion compelled dismissal of petitioner's action:

> United States district courts, therefore, have subject matter jurisdiction over general challenges to state bar rules promulgated by state courts in nonjudicial proceedings which do not require review of a final state court judgment in a particular case. They do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. [460 US at 486, 103 SCt at 1317]

By its terse dismissal order, however, the

district court did not show how it reached this conclusion, nor did the court of appeals elucidate the process by its mute affirmance.

Petitioner challenged a state bar rule, promulgated in nonjudicial proceedings and applied in the disciplinary action against him, as unconstitutional in requiring the trial on the merits of a disciplinary action against any attorney raising the due process issue of fair notice before resolution of the issue. Respondent, adopting the report and recommendation of its disciplinary agency in petitioner's case, construed the rule to require disciplinary factfinding to proceed against attorneys not fairly notified of the charges on petitions so inadequate as not to allow them to know with what they are charged.

As petitioner presented a general challenge to a state bar rule promulgated in nonjudicial proceedings, the jurisdict-

ional question must be whether his challenge required review of either a final state court judgment in a particular case, as the district court suggested in its reference to "a final judicial decision," or a state court decision in a particular case arising out of judicial proceedings.

1. Petitioner's Challenge to Respondent's "Recommended Disposition" Rule Does Not Require Review of Any Final State Court Judgment

Petitioner's complaint addressed none of the factual findings or legal conclusions comprising respondent's final judgment in the disciplinary action against him. A declaration that the challenged rule, as promulgated, established a procedure that violates due process for want of fair notice and opportunity to be heard would affect the judgment as governed by unconstitutional rulemaking, but such indirect impact is no review of the judicial process that applied the legislative or nonjudicial act

that made the rule, only a consequence of a determination that no such rulemaking authority may be exercised under the US Constitution.

Jurisdiction, of course, depends as much on an actual case or controversy as on appropriate subject matter, and petitioner cannot challenge respondent's rule unless by its application he "personally has suffered some actual or threatened injury," Gladstone Realtors v. Village of Bellwood, 441 US 91, 99, 99 SCt 1601, 1607, cited in Spencer v. Honorable Justices of Pennsylvania Supreme Court, 579 FSupp 880, aff'd 760 F2d 261 (CA3). Respondent's disciplinary action against petitioner, governed by an unconstitutional procedure that denies due process, is an actual injury and standing for his challenge to the procedure.

2. Petitioner's Challenge Requires No Review of Any State Court Decision in Judicial Proceedings

The district court ruling that petitioner sought to have it "review a final judicial decision" refers most probably to the final state court judgment in respondent's disciplinary case against petitioner. Petitioner's complaint alleged, however, that respondent refused not only to decide pretrial his motion to dismiss the charges as vague and overbroad but also even to consider it, thus ironically violating its own unconstitutional rule providing for pretrial consideration and posttrial disposition. This allegation, reflecting the actual facts, does not raise the question of whether petitioner's challenge required review of respondent's decision not to follow its own rule in a particular case, for it does not alter the general nature of the challenge to the rule. Respondent's violation of the

rule or its compliance with it is immaterial to the issue of its constitutionality. Either way, in any case, the result is the same, the trial of disciplinary actions against attorneys who raise the issue of fair notice but receive no decision it until after they attempt to defend themselves against the charges. Petitioner's general challenge, therefore, was not personalized by this particular allegation, which did not require review of the state court fact-finder's decision not to consider and recommend a posttrial disposition of his motion to dismiss for want of notice in his particular case. Had his motion been considered according to respondent's "recommended disposition" rule, the result would have been the same for the purpose of his challenge.

3. The DC Circuit's Decision Not to Hear Petitioner's Challenge Appears to Be in Conflict with 5th and 10th Circuit Decisions

Federal plaintiff Feldman alleged actual injury in the application of an unconstitutional rule governing admission to the bar, and he was allowed "a general attack on the constitutionality of Rule 46-I(b)(3)," Feldman, supra at 487, 103 SCt at 1317. Subsequently, in Howell v. State Bar of Texas, 710 F2d 1075 (CA5), the court ruled that Feldman "establishes that the district court has jurisdiction to decide [Howell's] constitutional challenge to the Texas disciplinary procedure," Id. at 1078; and in Razatos v. Colorado Supreme Court, 746 F2d 1429 (CA10), the court recognized district court jurisdiction over the attorney's "generalized attack on the state's rules and regulations governing discipline," Id. at 1432. Evidently, petitioner's challenge in this case to respondent's "recommended disposit-

ion" rule of motions procedure governing bar disciplinary cases, rejected as beyond the jurisdiction of the DC Circuit, would be heard in the 5th and the 10th Circuits, where similar challenges have been adjudicated.

CONCLUSION

The DC Circuit's disclaimer of subject matter jurisdiction of petitioner's 42 US Code 1983 action challenging respondent's "recommended disposition" rule governing bar disciplinary proceedings applies the Feldman doctrine inconsistently with decisions in other circuits and should be reviewed; therefore, this petition for review should be granted.

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APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. STANTON, *
1901 Columbia Rd NW,
Washington, DC 20009,
Phone 232-5369,
Plaintiff

* Civil Case #84-1619

DISTRICT OF COLUMBIA
COURT OF APPEALS,
500 Indiana Ave NW,
Washington, DC 20001,
Phone 347-1811,
Defendant *

COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF FOR VIOLATION OF CIVIL RIGHTS

Plaintiff John J. Stanton states under penalty of perjury the following as true and correct according to information and belief:

(1) This action arises under the due process clause of the 5th and 14th Amendments to the Constitution of the United States and under the Civil Rights Act, 42 US Code 1983, with jurisdiction conferred by 28 US Code 1331, 1343, 2201, and 2202.

(2) Plaintiff is an attorney admitted to membership in the bar of this court and in that of defendant District of Columbia Court of Appeals, constituted under 11 DC Code 102 as the highest court of the District of Columbia with authority under 11 DC Code 2501 to make such rules as it deems proper respecting the regulation and discipline of members of its bar.

(3) By this authority defendant prosecuted disciplinary proceedings against plaintiff, and plaintiff moved to dismiss the petition of charges for failure to clearly allege misconduct in terms of the Code of Professional Responsibility published by the American Bar Association and adopted by defendant as the standard governing the practice of law within defendant's jurisdiction. Plaintiff's motion was referred to a hearing committee appointed to receive and report on evidence of the charges, and the hearing committee then refused to consider plain-

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tiff's motion for the reason that it lacked authority under defendant's disciplinary procedure to entertain it. Defendant's procedure requires its hearing committee to report recommendations as to the ultimate disposition of the charges on their factual merits together with recommendations as to the disposition of motions, including motions challenging the legal merits of the charges. Thus, defendant's procedure required the trial of the disciplinary action against plaintiff prior to the determination of whether he was fairly notified of the charges against him.

(4) Under this procedure, defendant adjudged plaintiff to have neglected legal matters entrusted to him and to have intentionally failed to seek lawful objectives, in terms of the Code of Professional Responsibility, according to a new rule mandating that counsel in criminal cases owe clients an obligation to pursue their interests "as

BEST AVA

they see them," a rule unconstitutionally vague and overbroad and deficient in notice. Based on this adjudication, an order suspending plaintiff for a year and a day from the practice of law as a member of defendant's bar was entered in DC App cases 83-142 and M124-82 on 30 November 1983. Defendant stayed this disbarment order pending consideration of plaintiff's petition for rehearing, denied 16 February 1984, and again pending determination of plaintiff's certiorari petition, denied 14 May 1984. When the Supreme Court denied review, defendant on 22 May 1984 ordered plaintiff's disbarment effective 21 June 1984.

(5) At all stages of the disciplinary proceedings plaintiff orally and in writing objected to defendant's motions procedure as wanting in due process and protested the standards of culpability applied to his conduct as vague, arbitrary, and inconsistent with his constitutionally assigned responsi-

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bilities as criminal defense counsel, and thus overbroad, but defendant ignored his objections and refused to hear and adjudicate them.

(6) Plaintiff's disbarment under defendant's new rule and new procedure deprives him under color of state regulation of the legal profession of his federal constitutional right to due process of law for want of fair notice and opportunity to be heard, in violation of the Civil Rights Act, 42 US Code 1983.

Now, therefore, plaintiff seeks judgment declaring defendant's new rule obliging criminal defense counsel to pursue client objectives "as they see them" in violation of the due process clause for vagueness and overbreadth and declaring defendant's new procedure in violation of the due process clause for want of fair notice and opportunity to be heard; and plaintiff seeks an order enjoining defendant from prosecuting

disciplinary actions or imposing disciplinary sanctions according to such procedure and such rule.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. STANTON, *
Plaintiff

* Civil Action
DISTRICT OF COLUMBIA No. 84-1619
COURT OF APPEALS,
Defendant *

O R D E R

This case comes back before the court on the plaintiff's motion to vacate dismissal and to amend complaint. The court had dismissed this case on June 29, 1984.

After giving careful consideration to the motion and the opposition thereto, together with the record in this case, the court concludes that it lacks jurisdiction over this matter and accordingly, the motion must be denied.

It is clear that the plaintiff seeks to have this court review a final judicial decision of the District of Columbia Court of Appeals. This court lacks jurisdiction

to do so. District of Columbia Court of Appeals v. Feldman, 103 SCt 1303, 1317 (1983).

In view of the above, it is hereby

ORDERED that the motion to vacate the order dismissing this case is denied, and it is

ORDERED that the motion to amend the complaint is denied.

JOHN GARRETT PENN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5831 September Term, 1985

John J. Stanton,

Appellant,

v.

District of Columbia Court of Appeals,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before ROBINSON, Chief Judge, and WRIGHT, Circuit Judge, and McGOWAN, Senior Circuit Judge

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues have been accorded full consideration by the court and occasion no need for an opinion. See Local Rule 13(c).

On consideration thereof, it is

ORDERED and ADJUDGED by the court that the judgment of the district court appealed from in this cause be and hereby is affirmed. It is

FURTHER ORDERED by the court sua sponte that the clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam

For the Court

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5831 September Term, 1985

John J. Stanton CA No. 84-01619

v.

District of Columbia
Court of Appeals

BEFORE: Robinson, Chief Judge; Wright, Circuit Judge; McGowan, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED by the court that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5831 September Term, 1985

John J. Stanton CA No. 84-01619

v.

District of Columbia
Court of Appeals

BEFORE: Robinson, Chief Judge; Wright, Circuit Judge; McGowan, Senior Circuit Judge

O R D E R

Upon consideration of appellant's motion to modify judgment, it is

ORDERED by the court that the motion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk